# In the United States Bankruptcy Court
# for the
# Southern District of Georgia
## Savannah Division

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| In the matter of: | ) | |
| | ) | Adversary Proceeding |
| ERNEST D. JONES ) | | |
| (Chapter 7 Case 91-41946) | ) | Number 93-4172 |
| | ) | |
| *Debtor* | ) | |
| | ) | |
| | ) | |
| | ) | |
| ERNEST D. JONES ) | | |
| | ) | |
| *Plaintiff* | ) | |
| | ) | |
| | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| BENNIE LOU HAUSENFLUCK | ) | |
| | ) | |
| *Defendant* | ) | |

**MEMORANDUM AND ORDER**
**ON MOTION FOR SUMMARY JUDGMENT**

Debtor, Ernest D. Jones, initiated this proceeding on December 3, 1993,

seeking an order from this court declaring a debt owed by him to the Defendant, Bennie Lou Hausenfluck, to have been discharged in his Chapter 7 case. Defendant filed her Motion for Summary Judgment on April 18, 1994, and Debtor filed a response to the Motion thirty days later, on April 23, 1994.[1] Based upon the parties' briefs, the record in the file, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

## FINDINGS OF FACT

The following facts are undisputed for the purpose of this motion.[2] Debtor and Defendant were formerly husband and wife, having been divorced by Final Judgment and Decree of the Superior Court of Effingham County, Georgia, on August 23, 1990. The Final Judgment and Decree incorporated a settlement agreement in which Mr. Jones received the marital home and was responsible for a first and second mortgage encumbering the property. The settlement agreement further required Debtor to "pay and hold wife harmless

[1] Debtor's response to Defendant's Motion was untimely. The Local Rules of this Court require any response to a motion for summary judgment be filed within twenty (20) days of service of the motion. See Rules 6.2, 6.6 of the Local Rules for the Southern District of Georgia. A party not responding to a motion within this time period indicates that it has no opposition to the motion. Id.

[2] Although the parties did not stipulate to any facts, Debtor did not, as part of his tardy response, controvert any of the facts set forth in Defendant's Statement of Material Facts to Which There Is No Genuine Issue To Be Tried, which statement is required to be attached to any motion for summary judgment under the Local Rules of this Court. *See* Rule 6.6 of the Local Rules for the Southern District of Georgia. Accordingly, Defendant's Statements of Material Facts will be taken as true for the purposes of this motion. Id.

for any claims, debts, liabilities or other obligations connected with said property." The Final Judgment and Decree further required Debtor to immediately list the house for sale according to the terms contained in the settlement agreement. Mr. Jones failed to list the house in accordance with the terms set forth in the agreement, and continued to increase the amount of the second mortgage by drawing upon the line of credit which the mortgage secured.

As a result of Debtor's failure to comply with the terms of the settlement agreement, Defendant filed a contempt action against Debtor, alleging that his failure to follow the terms of the Final Judgment and Decree placed him in contempt of court. The contempt action was settled by a consent order, entered September 5, 1991, in which Mr. Jones reaffirmed his obligation for the debt owed under the second mortgage owed to Bank South.

Debtor filed a petition under Chapter 7 twenty-two days later, on September 27, 1991. The case was a so-called "no-asset" case, there being no assets available for distribution to unsecured creditors. Debtor received a discharge on January 16, 1992, and the case was closed on January 21, 1992. The discharge included a deficiency claim which Bank South held after foreclosure upon the marital home.

Debtor having been discharged on the debt, Bank South sued Defendant. Thereafter, Defendant filed a second contempt action against Debtor in the Effingham County Superior Court. The matter was tried, and the Court, by order dated July 14, 1993, made the following findings:

1) That Debtor was in willful contempt of the original Divorce Decree as well as the subsequent consent order dated September 5, 1991 because he failed to hold Defendant harmless for any claims, debts, liabilities or other obligations connected with the marital residence;

2) That Debtor's bankruptcy did not discharge his obligation to Defendant because he failed to notify Defendant of his bankruptcy case.

3) That Debtor was responsible to indemnify and hold Defendant harmless for the debt owed to Bank South in the amount of $13,322.49 in principal, $2,320.62 in interest and $2,087.33 in attorney's fees.

Following the entry of the Superior Court's July 14th order, Debtor moved this Court to allow him to reopen his case so that he could list Defendant as a creditor and

discharge his obligation to her as part of his Chapter 7 case. A hearing was held on the Motion on October 12, 1993. On November 16, 1993, this Court entered an Order denying Debtor's Motion to Reopen the case. On December 12, 1993, Debtor filed the instant proceeding alleging that, while Defendant was not listed in Debtor's bankruptcy schedules, her attorney was, and Defendant admitted to having actual notice of Debtor's Chapter 7 case. Accordingly, Debtor seeks a judgment declaring that the debt owed to his ex-wife was discharged in his Chapter 7 case.

In support of her motion, Defendant contends that, under Bankruptcy Rule 4007, a bankruptcy case must be reopened, under the standards set forth in section 350 of the Code, before an adversary proceeding to determine dischargeability can be initiated. And, because this court has previously ruled that Debtor's case may not be reopened under section 350, Defendant asserts that this proceeding is inappropriately pending before this court.

In response, Debtor asserts that, under Rule 4007 and the prevailing case law, adversary proceedings to determine dischargeability of unscheduled debts may be initiated in closed bankruptcy cases without the necessity of first prevailing on a motion to reopen. In support of this assertion, Debtor cites In re Banks-Davis, 148 B.R. 810 (Bankr.

E.D.Va. 1992).

## CONCLUSIONS OF LAW

As a general rule, "the dismissal of a bankruptcy case normally results in the dismissal of related proceedings because jurisdiction is premised upon the nexus between the underlying bankruptcy case and the related proceedings, but . . . the general rule is not without exceptions." In re Morris, 950 F.2d 1531, 1534 (11th Cir. 1992) (*citing* In re Smith, 866 F.2d 576, 580 (3d Cir. 1989)). The Eleventh Circuit made this statement in ruling on the issue of whether a bankruptcy court may retain jurisdiction over an adversary proceeding, initiated prior to the dismissal of the underlying bankruptcy case, after the underlying bankruptcy case has been dismissed. The Court concluded that dismissal of the underlying bankruptcy case did not "automatically strip" the bankruptcy court of jurisdiction over an adversary proceeding initiated before the underlying case was closed, when the proceeding was related to the underlying case at the time of its commencement. Id.[3]

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[3] *Accord* In re Carraher, 971 F.2d 327, 328 (9th Cir. 1992); In re Smith, 866 F.2d 576, 580 (3d Cir. 1989) In re Stardust Inn, Inc., 70 B.R. 888, 890 (Bankr. E.D.Pa. 1987) (Although general rule is that a dismissal of a bankruptcy case results in dismissal of all remaining adversary proceedings, dismissal of the underlying case does not mandate dismissal of all pending adversary proceedings, even one that is only "related to" the bankruptcy case); In re Pocklington, 21 B.R. 199, 202-03 (Bankr. S.D.Cal. 1982) (bankruptcy court is not prohibited from retaining jurisdiction over adversary proceeding which arose in or was related to a bankruptcy case, following dismissal of the underlying bankruptcy case); In re Lake Tahoe Land Co., Inc., 12 B.R. 479, 481 (Bankr. D.Nev. 1981) (jurisdiction of bankruptcy court over adversary proceeding arising under Title 11 is not, in all circumstances, dependent upon the continuation of the underlying bankruptcy case). *Contra* In re Rush, 49 B.R. 158 (Bankr. N.D. Ala. 1985) (Adversary proceeding may not be brought in bankruptcy court if there is no bankruptcy case in which it might be instituted).

Thus, it is clear that an adversary proceeding may have a life independent of that of the underlying bankruptcy case. The more difficult question, raised by this adversary proceeding, is whether the bankruptcy court has jurisdiction over an adversary proceeding which was initiated after the underlying bankruptcy case has been closed. Stated another way: Is the pendency of a bankruptcy case a jurisdictional pre-requisite to the filing of an adversary proceeding that is related to the bankruptcy case? If pendency is a jurisdictional pre-requisite, then this court's order, entered November 17, 1993, denying Debtor's motion to reopen, dictates that Defendant's motion be granted and this proceeding be dismissed. If, on the other hand, pendency is not a pre-requisite, then the proceeding is properly before the court and Defendant's motion must be denied and the case heard on the merits.

The only provision within the Bankruptcy Code or Rules which deals with this precise issue is Bankruptcy Rule 4007(b), which provides:

> A complaint other than under § 523(c) may be filed at any time. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule.

Fed.R.Bankr.P. 4007(b). Preliminarily, I note that neither party contends that the debt at

issue is of a kind dealt with under section 523(c). Section 523(c) provides that a debtor is discharged from a debt of the kind specified in sections 523(a)(2), (4) and (6) unless the court, upon request of a creditor and after notice and a hearing, determines otherwise. Bankruptcy Rule 4007(c) requires a creditor to make such a request within 60 days of the first date set for the first meeting of creditors. Thus, with the exception of subsections (2), (4), and (6), complaints under section 523(a) may be brought any time in bankruptcy court or in a nonbankruptcy (state) forum with which the bankruptcy court shares concurrent jurisdiction. *See* In re Banks-Davis, 148 B.R. at 813 (*citing* Brown v. Felsen, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979)). Therefore, either party could have brought a complaint to determine the dischargeability of the debt under section 523(a)(5) at any time in either this court or the Superior Court of Effingham County.

Although the language of Rule 4007(b) suggests that the underlying bankruptcy will be reopened before a complaint is filed in bankruptcy court, courts considering this precise issue have held that an adversary proceeding which would "arise under" Title 11 or "arise in" the underlying case may be initiated after the case is closed without the necessity of reopening the case. *See e.g.*, In re Banks-Davis, 148 B.R. at 813; In re Cain, 142 B.R. 785, 787-88 (Bankr. W.D.Tex. 1992); In re Funket, 27 B.R. 640 (Bankr. M.D.Pa. 1982). *Contra* Walnut Assoc. v. Saidel, 164 B.R. 487 (E.D.Pa. 1994).

In Banks-Davis, a number of creditors of the debtor sought to reopen the case under section 350(b) of the Code in order to file a complaint to determine the dischargeability of a debt pursuant to section 523(a)(3)(B) of the Code. The creditors alleged that, had they been properly notified of debtor's bankruptcy, then they would have prevailed on an action under section 523(a)(4). The debtor contended that, because the complaint had not timely brought under section 523(c), the motion to reopen should be denied.

The court first noted that the general rule was that jurisdiction over adversary proceedings ceases with the closing of the bankruptcy case. Banks-Davis, 148 B.R. at 812-13. The court then concluded that there are certain exceptions to this rule:

> [T]his court believes that it was the intention of Congress that bankruptcy jurisdiction continues for the purpose of deciding proceedings "arising under" title 11 despite the closing of the case. In re GWF Investments, Ltd., 85 B.R. 771, 780 (Bankr. S.D.Ohio 1988). For a bankruptcy court to retain jurisdiction of a case after closing, the party must be claiming a right or remedy created by one of the specific section of title 11 U.S.C. § 101 *et. seq.* Id. at 775. [The creditor's] complaint to determine dischargeability of debt under § 523(a)(3)(B) arises under a specific provision of the Bankruptcy Code. This Court retains jurisdiction to hear the adversary proceeding even though the case has been closed.

Id. The court went on to hold that, in spite of the language of Rule 4007(b), a "motion to reopen a closed case is not necessary prior to the filing of a complaint to determine dischargeability under 11 U.S.C. § 523(a)(3)(B)." Id.

In Cain, the court was faced with the question of whether to allow a debtor to file an adversary proceeding under section 505 of the Code to determine income tax liability in a closed no-asset Chapter 7 case. The court began by noting that the legislative history to 28 U.S.C. §§ 157 & 1334 "indicates that even after a bankruptcy case is closed, jurisdiction continues in order for the bankruptcy court to hear proceedings concerning claims and controversies arising under Title 11." In re Cain, 142 B.R. at 787 (*citing* In re GWF Investments, Ltd., 85 B.R. 771, 780 (Bankr. S.D.Ohio 1988)). The Court was unable to find the same directive in the legislative history for proceedings which are merely "related to" the bankruptcy case, but noted that a number of courts had retained jurisdiction over such proceedings when extenuating circumstances were present. Id.

In light of these decisions and the Eleventh Circuit's conclusion in Morris that a bankruptcy court may retain jurisdiction over an adversary proceeding after the underlying case has been closed, I am persuaded that this court has jurisdiction over the

instant proceeding, which arises either "under title 11" or "in a case under title 11"[4], without the necessity of reopening Debtor's underlying Chapter 7 case. Accordingly, Defendant's motion for summary judgment must be denied and the proceeding heard on its merits.

## ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Motion for Summary Judgment of Defendant, Bennie Lou Hausenfluck, is hereby DENIED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of June, 1994.

[4] *See* 28 U.S.C. § 1334; In re James Edward Cady, Jr. (Rentrak Corp. v. James Edward Cady, Jr., et. al., Adv. Pro. No. 93-05024, Ch. 7 No. 93-50258 slip op. at 6 (Bankr. M.D.Ga. March 11, 1994) (Walker, B.J.),